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NO. A-264 -

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STATES  
ALEXANDER L. STEVAS,  
CLERK

IN THE SUPREME COURT OF THE UNITED  
October Term, 1982

JANICE M. HAYES,  
*Petitioner,*

vs.

VALLEY BANK OF NEVADA, a Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN C. WHELTON, individually and as agents or officers of VALLEY BANK; WESTERN STATES BANKCARD ASSOCIATION, a California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE: TRW, INC., an Ohio corporation d/b/a/ TRW CREDIT DATA, aka TRW INFORMATION SERVICES: STATE OF NEVADA: JOHN C. MOWBRAY, ELMER GUNDERSON, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their capacities as Justices of the Nevada Supreme Court,

*Respondents*

On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit

*PETITION FOR WRIT OF CERTIORARI*

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*Petitioner*

(Petitioner has not been an attorney for a sufficient length of time to be admitted to the Bar of this Court.)

## QUESTIONS PRESENTED

The central questions presented herein pertain to the constitutionality and validity of Nevada Rule of Appellate Procedure 46(b), which prior to its 1981 amendment, prohibited litigation in proper person before the Nevada Supreme Court.

1. Whether the Nevada Supreme Court may constitutionally deprive pro se civil litigants of their right to an appellate review for the sole reason that they have not obtained an attorney?

2. Whether NRAP 46(b) is violative of the provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution and the provisions of the Sherman Anti-Trust Act when applied to cause dismissal of civil appeals of right?

3. Whether the federal district court

should assume jurisdiction of petitioner's claims as petitioner has no feasible state forum available and would be prejudiced as either appellant or respondent before the Nevada Supreme Court?

4. Whether the Nevada Supreme Court's refusal to review pro se civil appeals can operate to let a state trial court judgment stand and create a res judicata bar?

5. Based on the fact that petitioner timely filed her counterclaims in the state court action, should her claims in federal court relate back to the date of the state court filing?

6. Whether the district court clearly erred in dismissing on a res judicata theory and whether the Court of Appeals so far departed from the accepted course of judicial proceedings as to call for this Court's power of supervision in that the Court independently

raised and erroneously decided issues of fact not raised or addressed by the district court, provided the appellees with a defense which they had not asserted, and decided an issue in conflict with the decisions of this Court in this same case.

The other questions presented did not pertain to NRAP 46(b) and were not decided or addressed by either the district court or Court of Appeals:

7. Whether the imposition of "late" charges" on a Master Charge credit card account, which charges were not disclosed to petitioner, represent an impermissible liquidated damages clause and a violation of state and federal statutes against usury?

8. Whether a credit reporting agency, such as TRW, INC, must disclose the sources on which it based and published its false credit reports and whether it is liable for its failure to investigate and correct false reports?

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*PETITIONER,*

*vs.*

VALLEY BANK OF NEVADA, a Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN WHELTON, individually and as agents or officers of VALLEY BANK: WESTERN STATES BANKCARD ASSOCIATION, a California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE; TRW, INC., an Ohio corporation d/b/a/ TRW CREDIT DATA, aka TRW INFORMATION SERVICES; STATE OF NEVADA; ELMER GUNDERSON, JOHN MOWBRAY, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their official capacities as Justices of the Supreme Court of Nevada,

*RESPONDENTS.*

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*On Petition For A Writ Of Certiorari To The  
United States Court Of Appeals For  
The Ninth Circuit*

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PETITION FOR WRIT OF CERTIORARI

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The petitioner Janice Hayes respectfully prays that a writ of certiorari issue to review the Memorandum Order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 21, 1982.

#### OPINIONS BELOW

The judgments of the United States Court of Appeals and of the United States District Court for the District of Nevada were not reported. The district court granted defendants' motions to dismiss and dismissed the Complaint with prejudice for want of jurisdiction. Case No. CV-LV-79-182, HEC, on May 18, 1981, and denied rehearing. The orders of the district court appear in the appendix hereto at p. 3a, *infra*, and p. 4a, *infra*, and of that of the Court of Appeals at p. 1a, *infra*.

#### THE JUDGMENTS OF THIS COURT

The instant case has previously been

before this Honorable Court on appeal from the Supreme Court of Nevada, taken pursuant to Section 1257(2) of Title the United States Code.

Hayes combined two factually unrelated cases from the Supreme Court of Nevada, Case No. 11631, *Valley Bank of Nevada v. Janice Hayes, sub nom. Hayes v. Valley Bank of Nevada*, and Case No. 11992, *Hayes v. Scotty Gladstone*, into one Jurisdictional Statement, which was docketed as Case No. 79-6152, *Hayes v. Valley Bank of Nevada; Hayes v. Scotty Gladstone and Mervin Iverson*.

This court dismissed for want of a properly presented federal question, 446 U.S. 902, 64 L.Ed. 254, 100 S.Ct. 1826, rehearing denied, 448 U.S. 908, 100 S.Ct. 3052. (June 30, 1980).

Hayes also took an appeal pursuant to 28 U.S.C. 1257(2) from orders of the Nevada Supreme Court in another case in

in which the constitutionality of Nevada Rule of Appellate Procedure 46(b) was the only federal question presented, Case No. 79-5777 in this Court, *Janice Hayes v. the Board of Trustees of the Clark County School District*.

This Court dismissed Case 79-5777 for want of jurisdiction and treating the appeal papers as a petition for certiorari, denied certiorari. 444 U.S. 1009, 100 S. Ct. 658 (application for extension of time to docket appeal denied); 444 U.S. 1061, 100 S.Ct. 994, (1980), rehearing denied, 448 U.S. 908, 100 S.Ct. 3052. (1980).

Hayes filed a Petition for Consecutive Rehearing in Case No. 79-5777, which was file-stamped as received by the Clerk of this Court on May 12, 1980, but which was returned to Hayes without presentation to the Court. Hayes's motions to add the Nevada Supreme Court and the State of

Nevada as appellees as real parties in interest, to recall and stay the judgment in Case No. 79-5777 (School District), to consolidate Case No. 79-5777 and No. 79-6152 (Valley Bank; Gladstone) for hearing and to stay the mandate in No. 79-6152 were also file-stamped received by the Clerk and returned to Hayes without being submitted to this Court for its consideration.

#### JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 21, 1982, p. 1a, *infra*. A petition for rehearing and motion for leave to file a late petition for rehearing, filed on July 13, 1982, have never been ruled on. A Motion To Recall The Mandate, filed July 15, 1982, was denied.

On September 13, 1982, Mr. Justice Rehnquist granted an extension of time until October 18, 1982 to file a Petition

for Writ of Certiorari. This Petition is timely filed within the extension of time granted.

The jurisdiction of this Court rests on 28 U.S.C. §1254(1). Neither the Court of Appeals nor the district court decided the federal questions presented. If this Honorable Court is not disposed to assume jurisdiction under 28 U.S.C. 1254(1), Hayes respectfully points out to the Court that jurisdiction could be found under 28 U.S.C. §1257(2), as her motions and petition for rehearing in her parallel cases taken pursuant to said statute are presumably still pending before this Court. See discussion under "JUDGMENTS OF THIS COURT," page 7 of this petition, *supra*.

Hayes also respectfully suggests that this Court could assume jurisdiction under 28 U.S.C. 2101(e), if it should find that the order of the district court



was not a final appealable order.

Hayes asks the Court to note that on November 15, 1982, she will file a Petition for Writ of Certiorari in Case No. A-299 in this Court, *Hayes v. the Honorable Justices of the Nevada Supreme Court*, which encompasses the within case.

CONSTITUTIONAL PROVISIONS,  
STATUTES, REGULATIONS AND  
STATE STATUTES INVOLVED

The constitutional provisions, statutes, regulations and procedural rules which are relevant to the determination of this case are as follows: the First, Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, 15 U.S.C. §§ 1601-1693, 15 U.S.C. §§ 1640 and 1681, Sherman Anti-Trust Act, § 1, 15 U.S.C. § 1, Nevada Supreme Court Rule 44 (SCR 44) and Nevada Rule of Appellate Procedure 46(b). ("NRAP 46(b)").

*Fifth Amendment to the Constitution of the United States:*

(N)or shall any person be deprived of life, liberty, or property without due process of law. .

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*Nevada Rule of Appellate Procedure 46(b), prior to its amendment in October, 1981, provided that:*

No party, except a habeas corpus petitioner, may appear in proper person before the Supreme Court.

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*(Nevada) Supreme Court Rule 44 provides:*

Nothing in these rules shall be so construed as to prevent any person from appearing in his own behalf in any court in this state except the supreme court.

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## STATEMENT OF THE CASE

This action began in a state court of Nevada when Valley Bank of Nevada, (Valley Bank), respondent herein, brought suit against Janice Hayes ("Hayes"), the petitioner herein, and the case would have concluded in the state courts but for the implementation of NRAP 46(b).

This case contains two parts: (1) Hayes's claims against all respondents herein except the Justices of the Nevada Supreme Court for abuse of process, libel, breach of contractual agreements, malicious prosecution, interference with business relationships, denial of credit and for violations of the Fair Credit Reporting Act, Equal Credit Opportunity Act, Truth in Lending Act and the usury laws of the federal government and the State of Nevada.

Jurisdiction was predicated on 28 U.S.C. §1331, 28 U.S.C. §1332, 15 U.S.C.

1681, 42 U.S.C. 1983, the fact that Hayes had no feasible state forum, and the concepts of pendent and ancillary jurisdiction.

Jurisdiction was invoked as to the Justices of the Nevada Supreme Court ("Justices") pursuant to 42 U.S.C. 1983, 42 U.S.C. §1343, 28 U.S.C. §1331, 28 U.S.C. §2201 and 2202 and 28 U.S.C. §2283.

The major federal questions presented pertain to Nevada Rule of Appellate Procedure 46(b): whether the Nevada Supreme Court's refusal to review civil appeals of right brought in proper person can operate so as to let a lower court judgment stand; whether the federal court should provide a forum when a litigant has no feasible state forum and whether the doctrine of relation back should apply to claims timely asserted in state court.

The relevant facts in this action

are as follows:

(1) Hayes was a holder of a Master Charge credit card issued by Valley Bank. Per agreement, Hayes made specified payments to Valley Bank each month based on the current revolving charge balance and Valley Bank Master Charge agreed to accept said payments each month instead of payment in full.

(2) In March, 1977, Valley Bank brought suit against Hayes, falsely alleging that her payments were two months past due. Hayes filed an Answer in proper person with an intended counterclaim not denominated as such.

(3) Prior to leaving to start law school in 1977, Hayes took out the money she had in the state teachers retirement fund and paid creditors, Valley Bank among them. Hayes paid only the undisputed sum due and refused to pay the attorney's fees

and costs of suit sought by Valley Bank.

(4) No papers other than the Complaint and Answer were filed. After more than a year had elapsed, the state court, sua sponte, noticed a "status check" hearing that Valley Bank show cause why its Complaint should not be dismissed for want of prosecution. About a week prior to said hearing, Valley Bank, without Hayes's knowledge or consent, submitted a paper styled "Consent to Dismissal With Prejudice," and a Proposed Order dismissing its Complaint with prejudice, and then obtained the state judge's signature in chambers. Valley Bank's "Consent" paper is appended hereto at p. 17a, *infra*, and the ex parte Order entered the same day, June 8, 1978, is at p. 18a, *infra*.

(5) Hayes moved for a trial of her counterclaims and for leave to supplement her Answer and intended counterclaim with

causee of action which had accrued in the year since the Answer was filed, which motions were denied by the state court. There was no trial of any of Hayes's claims and no dismissal, therefore, of her later-accruing claims. The final order is at p. 13a, *infra*.

(6) Hayes filed an appeal in proper person to the Nevada Supreme Court, which is the only appellate court above the trial courts. All civil appeals are of right. The Clerk advised Hayes by letter of the provisions of Nevada Rule of Appellate Procedure 46(b), prohibiting any appearance in proper person. Hayes filed a motion for leave to appear in proper person and motions to waive NRAP 30 and 32 relating to preparation of an appendix, none of which motions was ever ruled on.

(7) Valley Bank did not file any motion to dismiss. Without notifying Hayes

that her appeal was subject to dismissal unless she obtained an attorney or setting a date when the Opening Brief was due, the Court, sua sponte, dismissed the appeal because Hayes had not filed the Opening Brief, notwithstanding that she had not been given leave to do so, see p. 12a, *infra*, and later denied rehearing, p. 11a, *infra*.

(8) After the Nevada Supreme Court dismissed the appeal, Hayes filed the instant action in federal court to avoid a statute of limitations bar, CV-LV-79-182, HEC. Hayes added defendants and other causes of actions that had accrued since the state trial court's Order in 1978. Hayes had, on July 11, 1979, also filed a separate action for declaratory relief against the Nevada Supreme Court to enjoin it from enforcing N.R.A.P. 46(b). The Nevada Supreme Court had already dismissed all of Hayes's appeals before the



federal district court granted the Nevada Supreme Court's motion to dismiss, without opinion or giving a reason therefor. No. CV-LV-79-142, RDF, Hayes v. Justices of the Nevada Supreme Court, Case No. 80-5311 in the Court of Appeals. (Hayes's Petition for Certiorari is due on November 15, 1982 in this above action).

(9) In the instant action, (Valley Bank), the Justices refused to answer interrogatories and filed motions for a protective order and for a stay of discovery. The district court dismissed the Complaint without ruling on discovery motions, saying that all of Hayes's claims were barred by the doctrine of res judicata. See p. 4a, *infra*, and denied rehearing without opinion, p. 3a, *infra*.

The district court did not address any of the federal questions presented.

(10) The Court of Appeals affirmed.

The Court of Appeals erred in independently raising and deciding issue of fact which had not been raised or litigated in the district court and which were not addressed in the district court's order. The Court of Appeals gratuitously provided the appellee Justices with a defense which they had not asserted and could not assert.

As Hayes has set forth beginning on page 4 herein, Hayes has previously taken an appeal to this court from the same orders of the Nevada Supreme Court which are at issue herein. This action was pending simultaneously in this Court and in the Court of Appeals with the knowledge of both courts.

After Hayes had filed the instant case in district court, the Justices contended that *Mirin v. Justices of the Nevada Supreme Court*, 415 F. Supp. Supp. 1178 (Nev. 1976) held that only the United States Supreme

has jurisdiction to decide the issue of the constitutionality of Nevada Rule of Appellate Procedure 46(b). Hayes, therefore, took an appeal to this Court, pursuant to 28 U.S.C. Sec. 1257(2), Case No. 79-6152, *Hayes v. Valley Bank; Hayes v. Scotty Gladstone and Marvin Iverson, supra*. Said appeal was filed in this Court before the district court ruled.

REASONS WHY THE WRIT OF CERTIORARI  
SHOULD BE GRANTED IN THIS CASE

This petition presents several of the reasons delineated in Rule 17 of the Rules of the Supreme Court as bases for consideration of a review on writ of certiorari.

1. This Court has already indicated that the issue presents a substantial federal question. This Court has never dismissed a case concerning Nevada Rule of Appellate Procedure 46(b) for want of a substantial federal question.

2. There is an important question of federal law which should be settled by this Court. The District Court for the District of Nevada and the Court of Appeals for the Ninth Circuit have consistently failed to rule on the issue and the Supreme Court of Nevada will not decide the question.

3. The Court of Appeals so far departed from the accepted course of judicial proceedings and exceeded its scope of review as to call for an exercise of this Court's power of supervision, and additionally permitted the district court to depart from the accepted course of judicial proceedings.

4. Both the district court and the court of appeals disregarded the prior determinations of this court, and decided the case and impliedly the federal question in a way in conflict with applicable decisions of this Court.

5. The issue of NRAP 46(b) can not be adequately presented in an appeal taken pursuant to 28 U.S.C. Sec. 1257(2) as an appellant can not bring the real parties in interest, the Nevada Supreme Court, before this Court. Hayes attempted to join the Nevada Supreme Court as appellees in *Hayes v. Valley Bank, supra*, 446 U.S. 902, but was advised by the Clerk of this Court that additional parties could not be joined in this Court by motion or otherwise.

THIS COURT HAD INDICATED THAT THE  
ISSUE OF THE CONSTITUTIONALITY OF  
NRAP 46(b) PRESENTS A SUBSTANTIAL  
FEDERAL QUESTION

The issue of the constitutionality of Nevada Rule of Appellate Procedure 46(b) and Nevada Supreme Court Rule 44 is a perennial one before this Court.

This Court has never dismissed a case presenting this issue for want of a substantial federal question.

The Court dismissed the instant case, *Hayes v. Valley Bank, supra*, for want of a properly presented federal question. This Court dismissed the companion appeal brought by the same appellant, petitioner herein, *Hayes v. Board of Trustees, etc., supra*, for want of jurisdiction.

This Court dismissed another appeal, *O'Connor v. State of Nevada, et al.*, for want of jurisdiction, 449 U.S. 944, 101 S. Ct. 343, reh. den. 449 U.S. 1104, 101 S. Ct. 905.

*Markoff v. American Heritage Insurance Company*, 100 S. Ct. 725, was dismissed for want of a properly presented federal question.

The Court denied petitions for a writ of certiorari in *Elva Haugen v. Richard Bryan*, 430 U.S. 909, reh. den. 430 U.S. 976, and in *Elva Haugen v. Glen Taylor, et al.* 431 U.S. 902. It is important to note, however, that the Court requested that the respondent file

a response, which indicates that at least one member of the Court considered that the case had merit.

The Court also requested that the appellee file a response in *Markoff*, notwithstanding that the appellee had filed a written waiver.

In *Hayes v. Board of Trustees, etc.*, *supra*, and *O'Connor, supra*, this Court treated the appeal papers as a petition for certiorari, and denied certiorari, which indicates that the cases fell within this court's certiorari jurisdiction and presented a substantial federal question.

It is also important to note that all of the above cases, except *Markoff, supra*, were filed by persons proceeding in proper person and in forma pauperis.

There may well be many other cases which have been presented to this Court which concern the constitutionality of

Nevada Rule of Appellate Procedure 46(b).

The issue will be before this Court again this Term in at least three cases, the within action and Case No. A-264, *Hayes v. Honorable Justices of the Nevada Supreme Court, supra*, and in *O'Connor v. State of Nevada, supra*, on petitions for certiorari to the Ninth Circuit Court of Appeals.

II. THERE IS AN IMPORTANT QUESTION OF  
FEDERAL LAW WHICH SHOULD BE SETTLED  
BY THIS COURT

Nevada Rule of Appellate Procedure 46(b) deprives litigants of the right to seek redress of grievances, of the fundamental right of access to the courts and of the equal protection of the laws, and deprives them of liberty and property interests without due process of law.

The state of Nevada has never shown any compelling state interest, legitimate justification or rational basis for Nevada Rule of Appellate Procedure 46(b).



NRAP 46(b) effectively abolishes a person's right to litigate in the trial court as the Nevada Supreme Court is the only appellate court. All appeals are as of right. Nevada 3A(b) lists appealable determinations. NRAP 46(b) takes away this statutory right of appeal from persons who can not obtain an attorney.

Hayes was brought into the judicial process as a civil defendant and then was denied the right to fully defend herself and to assert her counterclaims.

A person may not be denied access to an appropriate judicial tribunal unless the bar to judicial relief can be constitutionally justified. *Mendez v. Heller*, 420 U.S. 916, 95 S. Ct. 1107. *Roberts v. LaVallee*, 389 U.S. 40.

It is well established that effective access to the courts is a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977). *Gaglie v.*

*Ulibarri*, 507 F. 2d 721 (9th Circuit 1974).

"Access to courts" encompasses all the means required for a litigant to get a fair hearing from the judiciary on grievances alleged by him. *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd* 404 U.S. 15, 92 S. Ct. 250.

This Court held in *Smith v. Bennett*, 365 U.S. 708, that to interpose any financial consideration between an indigent and his right to sue is to deny him the equal protection of the laws.

The constitutional guaranties of due process and equal protection require that person forced to settle their claim through the judicial process must be given a right to be heard and to have full access to the courts. *Boddie v. Connecticut*, 401 U.S. 731, 91 S.Ct. (1971).

Hayes meets the tests articulated in

*Boddie, supra; United States v. Kras*, 409 U.S. 434 (1973), and *Ontwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172.

She was compelled to file an Answer and compulsory counterclaims. There is no extrajudicial means for resolving her grievances against the defendants and no forum other than the courts available.

Hayes can not now litigate this action in the state courts. The Nevada Supreme Court has refused to reinstate the appeal notwithstanding that she is now an attorney. See p. 10a, *infra*.

The Justices have also refused to voluntarily disqualify themselves. See p. 10a, *infra*.

Hayes does not have the remedy of disqualification available, as Article 6, section 2 and Section 4 of the Nevada Constitution appear to limit the number

of Justices who can be disqualified to two. Hayes would be prejudiced as either appellant or respondent before the Nevada Supreme Court.

111.     The Court Of Appeals Departed From  
          The Accepted Course of Judicial  
          Proceedings and Exceeded The Scope  
          Of Review

The Court of Appeals departed from the accepted course of judicial proceedings, permitted the district court to depart from the accepted course, disregarded the prior judgments of this court and exceeded its jurisdiction and scope of review as an appellate court.

The Court of Appeals erred in the following respects:

1. It independently raised and decided an issue of fact which was not raised in the district court and which was not addressed in the district court's order.

The district court did not address the issue of NRAP 46(b) or discuss whether the Nevada Supreme Court had dismissed Hayes's appeal pursuant to NRAP 46(b). See p. 4a, *infra*.

The Court of Appeals, sua sponte, decided that Hayes's appeal was not dismissed pursuant to NRAP 46(b). See Memorandum, p. 1a, *infra*.

The Court of Appeal's conclusion was based on pure speculation and conjecture. There is no evidence in the record to support said conclusion. Hayes did not have an opportunity to challenge said supposition. It was raised for the first time in the Court's Memorandum.

There is no basis for the Court of Appeal's speculation that: (1) The Nevada Supreme Court would have granted Hayes an extension of time to file the Opening Brief: (2) that the court would have continued to grant continuances for more than a year until

September 24, 1980, the earliest date on which Hayes could be admitted to the Nevada Bar; (3) that the court would have accepted briefs filed in proper person, or (4) that the court would not have stricken a brief filed in proper person had Hayes done so.

The evidence shows that the Nevada Supreme Court would not have accepted a brief filed in proper person. In fact, in *Markoff, supra*, the Court struck a brief filed in proper person, see p. 18a, *infra*, and dismissed the appeal.

(2) The Court of Appeals gratuitously provided the defendant Justices with a defense which they themselves had not asserted and could not assert. In addition, the Justices would have been foreclosed from raising said defense for the reason that they refused to answer interrogatories pertaining to their dismissal of Hayes's appeal and the reason therefor.

(3) The Court of Appeals exceeded its jurisdiction as an appellate court.

(4) The Court, without giving any reason therefor or identifying any motion which might be frivolous, stated that some of Hayes's motions were frivolous. The Court failed to indicate that its comment was based on the district's court's comment concerning one motion filed by Hayes. The district's court's statement, in turn, was based on its misconception that Hayes had disobeyed one of its orders, which statement is disproved by the record.

(5) The Court of Appeals improvidently heard and decided an order which was not a final order pursuant to 28 U.S.C. Sec. 1291. The district court did not address or adjudicate Hayes's claims which arose after her Answer was filed in state court, Hayes's claim for a declaratory judgment that NRAP

46(b) is unconstitutional; Hayes's claims pertaining to NRAP 46(b), Hayes's claims brought under 15 U.S.C. Sec. 1681 and 1691 and her claims against defendant TRW, INC. which were independent of the action against the other defendants.

(6) The district court and court of appeals erred in concluding that Hayes's claims had been litigated in state court. Hayes has demonstrated that most of her claims arose after the state court answer was filed in April, 1977. The trial court's order, p. 13a, *infra*, clearly shows that the state court denied only Hayes's motions to have a trial of her counterclaims and to amend and supplement her original Answer and intended counterclaim. There never was any trial of Hayes's claims which accrued after the Answer was filed.

The docket sheet of the minute



proceedings clearly demonstrate that the only matters considered by the state court was whether it should hear Hayes's claims in that action. The docket sheet, p. 15a, *infra*, shows that there was no trial of Hayes's claims and no dismissal of said claims.

The district court erred in dismissing on a res judicata theory. The state court plaintiff, Valley Bank, voluntarily dismissed its own Complaint against Hayes, the state court defendant, without any inducement from Hayes and it abandoned its claims for attorney's fees and costs of suit. See Order, p. 16a, *infra*, and "Consent" filed by Valley Bank, p. 17a, *infra*.

(7) The district court and court of appeals erred in concluding that the federal court could not review the state court's decision that Hayes's pro se Answer did not

adequately set out her counterclaims. A federal court may freely review conclusions of law.

(8) The district court erred in granting defendants' motions to dismiss without giving Hayes an opportunity to obtain discovery and without ruling on pending discovery motions.

#### IV The Determinations Of The Lower Courts Are In Conflict With The Judgments Of This Honorable Court

The district court disregarded the findings of this court in *Hayes v. Valley Bank, supra*. This Court necessarily found that the Nevada Supreme Court had dismissed Hayes's appeal pursuant to NRAP 46(b); that the judgment did not rest on any adequate state ground; that the reason given--that the appeal was dismissed because Hayes did not file an Opening Brief--was an evasion,

as the Nevada Supreme Court had not given Hayes leave to file said brief in proper person, and that the issue of the constitutionality of NRAP 46(b) presented a substantial federal question. If it were otherwise, this Court would have dismissed for want of a substantial federal question.

The district court should have heard and decided the other issues raised by the implementation of NRAP 46(b).

The Court of Appeals not only erred in making findings of fact; it also decided the facts erroneously. The Court of Appeals' conclusion that the Nevada Supreme Court dismissed for a reason other than Hayes's inability to comply with NRAP 46(b) conflicts with this Court's necessary finding that the dismissal was made pursuant to NRAP 46(b) and that Hayes had standing to draw into question the constitutionality and validity of said statute.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully suggests that this Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JANICE HAYES, ESQ.